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IN THE

# Supreme Court of the United States

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**October Term, 1970**

**No. .....**

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LARRY L. STEVENS and GLORIA STEVENS, his wife; and WILLIAM G. BOYD and JANE DOE BOYD, his wife,
*Petitioners,*

v.

J. LAWRENCE BUCKLEY and ALMA E. BUCKLEY, his wife; and ALMA KATHLEEN OGLE, as Executrix of the estate of J. Lawrence Buckley; and ROBERT J. CADRANELL and CARMEN CADRANELL, his wife; and RORERT L. CADRANELL and JANE DOE CADRANELL, his wife; and ROY W. MYERS and VIRGINIA MYERS, his wife,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON (DIVISION No. 1, SEATTLE, WASHINGTON)

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The petitioners, Larry L. Stevens and Gloria Stevens, his wife, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Washington, Division No. 1, at Seattle, Washington, made and entered November 16, 1970 (Petition for rehearing denied on the 21st day of December, 1970.) Petitioners were denied a review by the Washington State Supreme Court by order of January 19, 1971.

## OPINION BELOW

The opinion of the Court of Appeals for the State of Washington appears in the Appendix hereto. No opinion was rendered by the Washington State Supreme Court.

## JURISDICTION

The opinion and judgment of the Court of Appeals for the State of Washington, Division No. 1, Seattle, Washington, was entered on November 16, 1970. A timely petition for rehearing was denied on the 21st day of December, 1970. A writ of review to the Supreme Court of the State of Washington was denied on January 19, 1971. This petition for certiorari was filed within 90 days of the latter date. This court's jurisdiction is invoked under the United States Constitution, Article 1, Section 10, forbidding a state from impairing the obligation of a contract. Under the usury statute of the State of Washington the burden of *disproving usury* is placed upon the *lender*. (Italics ours)

## QUESTIONS PRESENTED

1. Are the petitioners protected against a judicial decision which so construes a state usury statute that it impairs a contract by destroying its remedy?

2. Does a state court decision, placing the burden of proof upon a lender of monies to disprove usury, impair rights under a private contract?

## STATUTES INVOLVED

"Revised Code of Washington (R.C.W.) 19.52.020 Usury-Penalty upon suit on contract. If a greater rate of *interest* than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore,

be void; but if in any action on such contract *proof be made that a greater rate of interest* has been directly or indirectly contracted for or taken or reserved, the plaintiff shall only recover the principal, less the amount of interest accruing thereon at the rate contracted for..." (Italics ours)

The United States Constitution, Article 1, Section 10, provides in part:

> "No State shall . . . pass any . . . law impairing the obligation of contracts. . ."

## STATEMENT OF THE CASE

In February of 1963 the respondents, Cadranells, borrowed the sum of $22,000 with interest at 12% per annum from Petitioners to remodel their Yacht Marina and restaurant in Seattle, Washington. The loan was secured by assignments of their leasehold interests and income in the marina and restaurant, a real property note and mortgage upon respondents' home and chattel mortgage on the equipment and fixtures in the restaurant.

The monies loaned to the Cadranells came from the respondents, Buckleys, but the trial judge found that they were petitioner's own funds. This finding permitted the trial court to sustain a usury charge by the Cadranells after they refused to repay their loan. At the same time it permitted judgment in favor of the Buckleys upon peitioner's promissory note to them for $22,000 without the taint of usury.

Petitioners charged a fee of 10% (labeled "finder's fee" or "commission" by the parties) of the total loan to Cadranells for spending better than one month checking and analyzing the securities for the loan and their financial strength to repay. The trial court found it was a "finder's

fee" *and therefore "interest."* It was uncontroverted that a charge of 10% or $2200 was fair and reasonable for the work done by appellants. (Italics ours)

Despite the lack of evidence that the fee charged was for the use of money and *therefore "interest"* under the usury statute, the trial court in effect switched the burden to petitioners to disprove the assertion of usury under the terms of the statute.

On appeal, the Court of Appeals simply upheld the finding of the trial judge that, as a "finder's fee," $2200 was an additional charge for a loan of money and therefore interest.

## REASONS FOR GRANTING THE WRIT

The decision below impairs petitioner's rights under private contract by so construing a state usury statute that the burden of disproof is placed upon the lender when any fee is charged. The statute is quasi-penal in nature and there must be a clear violation of its terms. *Simpson v. Cox,* 167 Wash. 34, 8 P.2d 424 (1932). The central question was whether a charge of $2200 is "interest" under the statute (RCW 19.52.020), not whether the findings were supported by the record.

Constitutional protection exists against a judicial decision which so construes a state statute that it effects an impairment of a contract obligation. *Tidal Oil Co. v. Flanagan,* 263 U.S. 444. Nor is this court limited to the consideration of the language of the opinion, but may examine the substance and effect of the decision since the decision may impliedly give effect to the state statute and impair the obligation of the contract, although not expressly mentioned. *Columbia R. Gas and E. Co. v. South Carolina,* 261

U.S. 236. The prohibition of the Federal Constitution of legislation impairing contract obligations applies to legislation acting directly on the contract itself or on the remedy. *Home Bldg. and Loan Asso. v. Blaisdell,* 290 U.S. 398.

Without evidence that the fee charge was for the use of the money loaned, Petitioners were placed in the unique position of *disproving the assertion.* The decision below that a "finder's fee" is by its nature for the use of money would seem to be nothing more than a legal conclusion which placed the burden of disproof wrongly upon petitioners under the statute.

Recognizing that petitioners could have made a charge for services in connection with the loan, the decision nevertheless impliedly thrusts upon the petitioners the burden of disproof under the state usury statute, *Peoples National Bank of Washington v. National Bank of Commerce of Seattle,* 69 Wn.2d 682, 420 P.2d 208 (1966). Such a statutory interpretation violates the integrity of private contract. *Chicago B. & O. Ry. Co. v. Nebraska,* 170 U.S. 57; Constitution, Art. I, Sec. 10.

The real substance and effect of the decision herein denies appellant's remedy under a bona fide contract. It places an impossible burden of disproof upon him by labeling the charge "interest" and calling it a question of fact.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Court of Appeals.

Respectfully submitted,

ROBERT H. STEVENSON
*Counsel for Petitioners*

# APPENDIX A

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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|---|---|
| J. LAWRENCE BUCKLEY and ALMA E. BUCKLEY, his wife; and ALMA KATHLEEN OGLE, as Executrix of the Estate of J. LAWRENCE BUCKLEY,<br>*Respondents,*<br>v.<br>LARRY L. STEVENS and GLORIA STEVENS, his wife; and WILLIAM G. BOYD and JANE DOE BOYD, his wife,<br>*Appellants,*<br>and ROBERT J. CADRANELL and CARMEN CADRANELL, his wife; and ROBERT L. CADRANELL and JANE DOE CADRANELL, his wife,<br>*Respondents,*<br>and ROY W. MYERS and VIRGINIA MYERS, his wife,<br>*Defendants.* | No. 279-41107-I<br>DIVISION ONE,<br>PANEL TWO |

UTTER, J. — Larry L. Stevens and William G. Boyd, appellants, loaned $22,000 to Robert J. Cadranell and others in his family and took in exchange a note payable at 12 per cent per annum. The Cadranells were charged with a $2,200 finder's fee and were required to give security interests in certain property they owned. On February 5, 1963, appellants were loaned $22,000 by J. Lawrence Buckley and his wife, who were given a promissory note by appellants. The money was paid to the Cadranells after the funds were received from the Buckleys.

The Cadranells later stopped making payments on their note and appellants also stopped making at that time to the Buckleys. The Buckleys sued appellants on their note.

Appellants denied liability and demanded the Buckleys foreclose their alleged security interest against the Cadranells, which they claimed was held in trust for the Buckleys' benefit. The Cadranells were joined by appellants who sought foreclosure of their security and judgment over on the Cadranell note. The Cadranells cross-claimed against appellants, setting out the defense of usury, and appellants in turn denied usury, alleging the $2,200 was a proper charge for services performed for the Cadranells in investigating their financial ability before making the loan.

Two separate transactions were found to exist by the court which granted the Buckleys a judgment against appellants for the amount due on their note and allowed the Cadranells an offset judgment on their cross-claim against appellants for usury in a sum equal to the entire amount due.

The assignments of error and arguments on appeal of appellants raise the basic question whether the challenged findings are supported by the record.

Although the documentary evidence and testimony is in conflict, there is support in both the oral testimony of the parties and their correspondence for the findings made by the trial court that the transactions between appellants and the Cadranells, and appellants and the Buckleys were separate transactions. The trial court's finding the $2,200 was a finder's fee is unchallenged.

Error is assigned to that portion of a finding of fact holding, "Said finders [*sic*] fee was in fact an additional interest charge by . . . [appellants] for their loan of money to the Cadranells." There are cases which hold a lender may charge a fee for services rendered when the fee charged

is reasonable and is not a commission for making the loan or payment for the use of money. *Peoples Nat'l Bank of Wash. v. National Bank of Commerce of Seattle,* 69 Wn.2d 682, 420 P.2d 208 (1966); *Testera v. Richardson,* 77 Wash. 377, 137 P. 998 (1914). The determination of this issue is a question of fact. Although the record indicates appellants went to considerable effort to satisfy themselves there was good security for the loan they were making, the evidence further shows appellants, in addition to the finder's fee, charged the Cadranells specifically for a credit report, title insurance premiums, attorney's fees and an escrow fee. The evidence does not compel us to find, as a matter of law, that the money charged as a finder's fee was strictly for services rendered, was reasonable and was not a commission for making the loan or a payment for use of money.

The cases have given the term "finder's fee" a meaning which is supportive of the trial court's determination and have defined it as compensation in the nature of a commission. *Davidson v. Robie,* 345 Mass. 333, 187 N.E.2d 371, 374 (1963); *Cray, McFawn & Co. v. Hegarty, Conroy & Co.,* 27 F. Supp. 93 (D.C.N.Y. 1939).

The trial court's determination that the charge was a finder's fee rather than a charge for services rendered is supported by substantial evidence. As a finder's fee charged by the lenders, the record further supports the finding of fact that it was an additional charge for a loan of money and therefore usurious. We find the other challenged findings and conclusions supported by the record.

The judgment of the trial court is affirmed.

We concur:

s/ HOROWITZ, J.

s/ UTTER, J.

s/ WILLIAMS, J.